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In the Supreme Court of the United States

October Term ~~1946~~ ~~1946~~ 58

No. ~~12~~ Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR REHEARING AND RECONSIDERATION OF MAJORITY OPINION

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UNITED STATES OF AMERICA,
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STATE OF CALIFORNIA,
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MOTION FOR LEAVE TO FILE PETITION AND PETITION FOR REHEARING AND RECONSIDERATION OF MAJORITY OPINION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of California respectfully requests leave to file this Petition and hereby petitions the Court for a rehearing and reconsideration of the majority opinion in this original proceeding.

Summary of Grounds for Petition.

The following is a summary of the grounds of this Petition for a Rehearing and Reconsideration of the Majority Opinion:

A. The majority opinion appears to hold that the existence of "national power" in and of itself has conferred upon the Federal Government rights equivalent to a proprietary interest in the lands and resources involved in this case. The majority finds no other basis for holding

that the Federal Government may "appropriate" this property for its own use.

The Constitution was designed to effect an adjustment and distribution of governmental powers and property rights between States and Federal Government. Under that distribution and adjustment broad governmental powers were granted to the Federal Government but, as this Court has frequently held, these powers did not carry with them any property rights or proprietary interests in lands within the boundaries of the States. The majority opinion, if allowed to stand, will (1) change and unbalance the entire constitutional relationship between the several States and the Federal Government and (2) seriously confuse, if not obliterate, the legal distinction between governmental powers and proprietary rights in property, a distinction the maintenance of which is essential to the stability of property rights of every nature.

A case of this type, involving basic questions of constitutional law, extensive property rights, and the long historical development of those rights as between governmental bodies, if tried in the usual way before a trial court, would reasonably have consumed many weeks of time in the sifting of factual, historic and legal data and in the presentation of legal argument. Specific findings of fact and conclusions of law would have been made as to all relevant issues before the case ever reached this Court. The fact that the Government chose to submit a cause of this magnitude upon a summary motion directed to the sufficiency of a responsive pleading, has de-

prived the Court of those benefits. The result is that a fundamental change in the foundations of our Federal system is being made by the majority opinion without a more detailed or exhaustive consideration of the many complex issues of law and fact involved than has been possible on the basis of the briefs submitted and three hours of oral argument.

The fact that this case has been so presented and decided, has, in our opinion, and with all respect to the Court, caused the Court to minimize the effect of a great many important factual and historical matters which would normally have been presented in detail to a trial court. For example, the Court's statement [Op. pp. 16-17]: "The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there," seems to us hardly in accord with the historical facts. The question of the ownership of the three-mile belt was of sufficient importance that it was the subject of numerous statutes in every coastal State long before oil was discovered. These statutes dealt with a great many important natural resources other than oil, and in all coastal States the ownership of the three-mile belt has always been considered of the greatest importance. The numerous State court decisions, particularly in the original States (which the majority apparently ignores), fully bear out what we say.

The great mass of legal material that was submitted for consideration by the Court in the brief time available, has,

in our opinion, caused the Court to overlook at least six established principles of law, each one of which, if given due consideration and application to the issues involved herein, would require a reversal of the majority opinion.

The propositions of law thus overlooked are the following:

1. The rule established by prior decisions of this Court holding that the Constitutional grants to the National Government of various governmental powers, including the power over external affairs, do not carry with them any cession of territory and do not necessitate the ownership of, or dominion (in a proprietary sense) over, any property within any State.

2. **This Court's prior rejection, in an opinion by** Mr. Justice Holmes, of the very same contention, now **accepted as the main basis of the majority opinion herein, that ownership by the National** Government **of the beds of international waters was a necessary corollary of the National Government's full power over external affairs.**

3. The rule established by prior decisions of this Court holding that territory may not be annexed to the United States or acquired by the National Government by action of the Executive Department but only by Congressional action.

(a) The only declaration the State Department has ever made upon the issue of Federal and State ownership of submerged lands under the three-mile belt is directly opposed to the majority opinion in this case.

4. The rule established by prior decisions (100 years old or more) declaring and holding that the original thirteen states, and not the National Government, own the marginal belt along their coasts.

5. The principle established by prior decisions of this Court holding that a rule of property law established either by repeated dictum or decisions, on the faith of which innumerable titles have vested, should not be rejected, no matter what may be the views of the present Court.

6. Prescription and acquiescence: The majority opinion, in its treatment of the subjects of prescription and acquiescence, has deprived the State of its sovereignty and relegated it to the position of a private individual.

(a) Title to the entire 3,000 square miles is vested in the State of California under the doctrine of prescription, as all this area has been officially claimed by California since 1849 and over 10% of the area has been actually occupied, used, granted or leased by the State; and by the doctrine of constructive possession, the entire area is deemed in law to be possessed; or

(b) In the alternative, and at the very least, title is vested in California as to those portions of the submerged lands (approximately 350 square miles) which have been actually granted, leased, occupied or improved through the State or its grantees, lessees or contractors; and this would include all areas upon which improvements have been made.

B. A still further ground for this petition is that the alleged distinction between the ownership or paramount dominion over inland waters on the one hand and the marginal sea on the other hand, has no constitutional, statutory or factual basis; is contrary to all prior decisions of this Court; and is created for the first time in history by the majority opinion herein.

The gratuitous assertion in footnote 1 of the majority opinion to the effect that there is an area off the California coast approximately 1,000 miles long and .45 of a mile wide, amounting to 450 square miles, that is a part of the United States but not included within any State or territory thereof, is not relevant to any issue herein and is, therefore, sheer *obiter dictum*. Moreover, it is contrary to well known facts of general common knowledge, of which courts are expected to take judicial notice, namely: that in 1849, as at present, the word "mile" had two diverse meanings, both in England and in the United States. In both countries, when used as a unit of measurement over land, it meant 5,280 feet,[1] and when used as a unit of measurement over water, it meant 6,080 feet.[1] The fact is that California's western boundary is three nautical miles from its coast, as has been declared by the California Supreme Court,[2] which is believed to be the paramount authority as to the meaning of words used in its constitution and statutes. This matter was called to the Court's attention in State's brief, p. 148, n. 161.

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[1]Disregarding negligible fractions.

[2]*Ocean Industries, Inc. v. Superior Court*, 200 Cal. 235, 245.

ARGUMENT.

I.

The Constitutional Grants to the National Government of Governmental Powers, Including the Power Over External Affairs, Do Not Carry With Them Any Cession of Territory, and Do Not Necessitate the Ownership of, or Dominion (in a Proprietary Sense) Over, Property Within a State.

It is a basic proposition of constitutional law that grants of power in the Federal Constitution carried with them no cession of territory. This proposition is, we submit, controlling in the present case. Obviously, if there was no cession of territory by the States to the Federal Government, there was no cession of any proprietary interests in land or in the products of the soil. And if there was no cession of any interests in land or in the products of the soil, *a fortiori* the Federal Government could not acquire property rights or interests in land within a State by the mere existence or even by the exercise of its granted powers. Yet the majority opinion is predicated on the theory that the Federal Government may, solely by virtue of its powers over external affairs, "appropriate" to its own use the real and personal property "in the seas next to its shores" and within the States' boundaries. Such a theory, if allowed to become law, will (1) obliterate the constitutional distinction between governmental powers and proprietary rights in land, and (2) nullify the constitutional principle that the grant of powers to the Federal Government carries with it no cession or transfer of property rights, a principle which has been settled since the decision in 1818 of *United States v. Bev-*

ans, 3 Wheat. 386, where Chief Justice Marshall said (p. 388):

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters in which those cases may arise? This is a question on which the Court is incapable of feeling a doubt. The article which describes the jurisdictional power of the United States *is not intended for the cession of territory,** or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article,[3] *we are to look for cessions of territory* and of exclusive jurisdiction. . . . It is observable that the power of exclusive legislation (which is jurisdiction) is united with *cession of territory, which is to be the free act of the states.*"

In *Corfield v. Coryell* (C. C. N. J. 1823), 6 Fed. Cas. No. 3,230, page 546, Mr. Justice Washington sitting on Circuit, said (p. 551):

> "The grant to Congress to regulate commerce on the navigable waters belonging to the several states, renders those waters the public property of the United States for all the purposes of navigation and commercial intercourse; subject only to Congressional regulation. *But this grant contains no cession, either express or implied, of territory, or of public or private property.*"[4]

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*Italics added here and elsewhere in this Petition unless otherwise noted.

[3]The reference to the 2d article is obviously a textual error. The article referred to is the 1st article.

[4]Followed with approval by this Court on several occasions: *Smith v. Maryland* (1855), 18 How. 71, 74; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 262.

In *Rhode Island v. Massachusetts* (1838), 12 Peters 657, 733, this Court said:

> "It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so, *till the state makes some cession.* The plain language of this Court in the *United States v. Bevans,* 3 Wheat. 386 *et seq.,* saves the necessity of any reasoning on this subject . . . Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled when boundary is ascertained . . ."

This is further buttressed by the crystal-clear provisions of Article IX of the Articles of Confederation which specifically provided that:

> "No state shall be deprived of territory for the benefit of the United States."

This was carried into the Tenth Amendment of our Constitution. (For full discussion of this entire subject, see State's Brief, pp. 41-65.)

It is impossible for us to understand how, in the face of these past decisions holding that Constitutional grants of governmental powers are unaccompanied by any cession of territory within a State, the majority opinion can rightfully conclude that the power of the National Government over external affairs or under international law takes with it paramount "dominion," in a proprietary sense, over the resources of a portion of the territory within the State boundary, to wit, the marginal belt.

The Federal Government, of course, has plenary power to conduct our international affairs and it is its duty to maintain an Army and Navy and to defend the States

from invasion. It is also true that the Federal Government may make international treaties involving the subject of oil as well as many other subjects, as it has frequently done. But this power does not authorize the Federal Government to "appropriate" the subject matter of such treaties to its own use.

And yet the majority opinion (p. 13), says:

> ". . . And in so far as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally *be appropriated for its use.*"

This statement is the heart of the Court's decision in this case. With all due respect, it is a plain *non sequitur* and is predicated on a misconception of the powers of the Federal Government in relation to the States and to foreign nations.

The rights of the United States under international law are rights as against other nations and have no bearing as to the distribution of property rights or interests as between States and the National Government. It is impossible, under any hitherto recognized principle of constitutional law, that the National Government has the right to acquire dominion (in a proprietary sense) or ownership over property wholly within the boundaries of a State by reason of any doctrine of international law. International law is concerned only with the rights and duties of the United States as against other nations and cannot control the domestic rights of a State to property within its boundaries. This has been a fundamental principle of

both constitutional law and real property law from the beginning of our history.

In *Johnson v. McIntosh* (1823), 8 Wheat. 543, 572, Chief Justice Marshall said:

> ". . . title to lands, especially, is, and must be, admitted, to depend entirely *on the law of the nation in which they lie.*"

In *Skiriotes v. Florida* (1941), 313 U. S. 69, 72-73, Chief Justice Hughes said:

> ". . . International law is a part of our law and as such is the law of all States of the Union . . ., but it is a part of our law *for the application of its own principles,* and these are concerned with international rights and duties *and not with domestic rights and duties.*"

If the National Government needs real or personal property in order to carry out its functions, it must acquire that property in a constitutional manner. If the need of the National Government for oil in order to perform its constitutional powers is to determine the question of ownership or the right to "appropriate" such oil for its own use, then a similar need for coal, iron, uranium, food or any other commodity will *ipso facto* vest in the Federal Government the right to take such property without payment of just compensation.

We respectfully submit that this basis of the majority opinion is directly contrary to established constitutional principles governing the distribution of property rights between States and Federal Government.

II.

This Court Has Heretofore Squarely Rejected, in an Opinion of Mr. Justice Holmes, the Very Same Contention That Ownership by the National Government of the Beds of International Waters Is a Necessary Corollary of the National Government's Full Power Over External Affairs.

The majority opinion fails to recognize the unanimous decision of this Court rendered in 1908, written by Mr. Justice Holmes. The Solicitor General in that case made exactly the same contention as that made in this case and accepted as the main basis of the opinion of the majority herein, namely that under international law, by reason of its powers over external affairs, the Federal Government must be the owner of the beds of international waters. The Court rejected that contention. That case is, we respectfully submit, controlling here and requires a reversal of the majority opinion. The case adverted to is *United States v. Chandler-Dunbar Co.* (1908), 209 U. S. 447. It involved title, as between the United States and the grantee from the State of Michigan, to the bed of navigable waters connecting the Great Lakes. These navigable waters constitute an *international boundary* between Canada and the United States. The Solicitor General argued in that case (209 U. S. 448, Footnote 1) that there was

> "The distinction between the inland waters of a State and international waters; . . ."

In its brief filed with this Court, the National Government contended in the *Chandler-Dunbar* case, through its Solicitor General (p. 109) that:

> ". . . the waters of the interior of a state concern only the state and its citizens, while waters on

the boundary of a border state, adjacent to another nation, concern the whole body of states. Both by the law of nations and by such treaties as the Nation may enter into with such foreign country, it becomes absolutely necessary that, as to such waters, the control should be vested in the Nation and not in the state."

And the Solicitor General further argued there that:

"The international character of the waters of the Great Lakes was one of the elements considered by this Court *in deciding that such lakes are high seas. United States v. Rogers,* 150 U. S. 266."

Mr. Justice Holmes, for a unanimous Court in the *Chandler-Dunbar* case, rejected the contention *in toto,* holding that the lands under the navigable waters there involved belong to the State of Michigan, merely saying (p. 452):

"We see no plausible ground for the claim of the United States."

The same contention was made in the Circuit Court of Appeals in the *Chandler-Dunbar* case, but that court likewise rejected it (152 Fed. 39), saying:

"In behalf of the complainant it is contended that there is a difference between the land in the bed of the inland rivers of a state and those on its boundary, especially where the boundary is an international boundary; but no substantial ground for such a distinction has been suggested, nor can we find any."

The beds of the Great Lakes, constituting an international boundary between Canada and the United States, presented a far stronger case for ownership in the National Government, in the *Chandler-Dunbar* case, than the plaintiff herein presents in its claim of ownership of the three-mile belt where no foreign nation owns the sea for thousands of miles outside the three-mile belt. If rights within the three-mile belt are to be based on the position of the National Sovereign in international affairs, and under international law, the National Government would logically have had to own not only the St. Mary's River, but the American half of the Great Lakes. But this Court summarily rejected the Government's contention for a distinction between inland waters and international boundary waters in the *Chandler-Dunbar* case. Likewise, this Court has repeatedly held that the States of New York, Illinois, and other Great Lakes States own the beds of the Great Lakes up to the international boundary line with Canada. (*Massachusetts v. New York* (1926), 271 U. S. 65; *Illinois Central Railroad Company v. Illinois* (1892), 146 U. S. 387.)

It is wholly unreasonable, we respectfully submit, to predicate title to the three-mile belt along the California coast upon the National Government's position in international law and "the necessity that a government next to the sea must be able to protect itself from dangers incident to its location" (Opinion p. 13), where other nations adjoining that sea are thousands of miles away, while at the same time this Court has uniformly held for decades that there is no such need for the National Government to

own the beds under navigable waters of the Great Lakes, which immediately adjoin another nation. It must not be overlooked that great naval battles have been fought upon the Great Lakes themselves in the early history of our Nation. Yet no one believed that this circumstance resulted in ownership by the Nation rather than by the bordering State. It is worthy of mention, simply by way of illustration, that the Chief of Staff of the United States Army, General Dwight D. Eisenhower, issued a statement on June 25, 1947, calling for United States-Canadian arms standardization and stating that:

> "in another war the first attack probably would be aimed at the Great Lakes and St. Lawrence River industrial areas."[5]

We urge that there is no possible distinction in law or in reason between the *Chandler-Dunbar* international boundary case and the issue in the instant case and that that case requires a reversal of the decision herein.

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[5]United Press release, Washington, D. C., June 25, 1947, Los Angeles Daily News, June 25, 1947.

III.

Territory May Not Be Annexed to the United States or Acquired by the National Government by Action of the Executive Department but Only by Congressional Action.

The majority opinion contains the assertion that "acquisition" of the three-mile belt has been "accomplished by the National Government" as a result of the establishment of the three-mile limit, through long recognition thereof by the State Department. (Opinion p. 13.) However, it is conceded that there has been no action of Congress looking toward the acquisition for the National Government of this three-mile belt, all lying within the territorial boundaries of California and of the other coastal States.

This assertion in the majority opinion ignores the Constitutional rule that in order for the United States to acquire the ownership of territory, Congress must take affirmative action. The act of the Executive Department alone is ineffectual to accomplish either the annexation or the acquisition of territory. This is the necessary result of Article IV, Section 3, of the Constitution, granting to Congress the power

> "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (*Dorr v. United States* (1904), 195 U. S. 138, 140.)

This Court, through Chief Justice Taney, said (*Fleming v. Page* (1850), 9 How. 603, 615), that:

> "The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace . . . *but this can be done only by the treaty-making power*

or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war."[6]

Since Congress has not acted, it is apparent that recognition by the State Department of the three-mile limit in international law is completely immaterial and ineffectual constitutionally to result in the acquisition of, or dominion (in the proprietary sense) over, this territory for the National Government.

Furthermore, the Court's interpretation of the acts of the State Department ignores the admitted history that the "cannon-shot" rule was well established in international law long prior to 1789 and was given recognition in this country prior to the formation of the National Government. (State's Br. pp. 174-185.) The three-mile rule was an outgrowth of the cannon-shot rule and was a mere definition and limitation *of the extent* of the adjoining marginal sea and not an appropriation or annexation of territory or property rights.

When the State Department undertook the responsibility, as against other nations, of maintaining the integrity of the three-mile belt of marginal sea, it was merely performing the normal duties with which the Federal Government is charged by the Constitution. In the performance of these duties the State Department never had any thought of acquiring proprietary ownership of the marginal sea or of the resources of its subsoil for the Federal Government. Its activities never veered in that direction.

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[6]To the same effect: *Balzac v. Puerto Rico* (1922), 258 U. S. 298, 309; *Dorr v. United States* (1904), 195 U. S. 138; *United States v. Arredondo* (1832), 6 Pet. 691, 711; *Foster v. Neilson* (1829), 2 Pet. 253, 309. State's Brief, page 188.

When President Truman declared in 1945 that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf . . . as appertaining to the United States, subject to its jurisdiction and control," he made it clear that this declaration was effective only as against other nations. It did not attempt to vest any proprietary interests in the Federal Government as against the States. This was specifically stated in the accompanying Executive Order wherein it was said:

> "Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three mile limit."[7]

This was a clear and explicit recognition by the President of the United States of the inability of the Executive Department, without Congressional action, to acquire proprietary ownership of territory. If an executive proclamation dealing specifically with the sea bed and its resources is not considered as vesting proprietary rights in the Federal Government as against the States, surely the acts of the State Department declaring to other nations that the United States will protect the three mile belt could not create a proprietary interest in land as against the States.

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[7]Executive Order 9633, dated September 28, 1945 (10 F. R. 12305). The above was omitted from the Government's quotation from the Executive Order in the Government's Opening Brief, p. 43.

Yet the Court has held that as a result of the performance of these acts the State Department has acquired for the Federal Government, as against the States, valuable property rights which the Federal Government would not otherwise have had.

We respectfully submit that this holding vitiates our constitutional distribution of powers and rights between the Nation and the States, as was made perfectly clear in Article I, Section 8, Clause 17 and in the Tenth Amendment of the Constitution, in Article IX of the Articles of Confederation and in the case of *United States v. Bevans, supra,* and the multitude of cases which have followed that case.

To hold, as the Court has done, that by the conduct of external affairs the Federal Government can deprive the States of their long recognized ownership of the beds of the marginal seas and can, in consequence, gain property rights for itself, is to attack the very foundations of our whole Federal system.

The Only Declaration the State Department Has Ever Made Upon the Issue of Federal and State Ownership of Submerged Lands Under the Three-Mile Belt Is Directly Opposed to the Majority Opinion in This Case.

In view of the fact that the majority opinion is based in part upon the action of the State Department, we feel it is important to call the Court's attention to the position recently taken by the State Department in relation to the precise issue here before the Court. That position was taken in connection with House Joint Resolution 225, which provided for the quitclaiming by the Federal Government of all submerged lands to the respective States.

While this resolution was under consideration by the Judiciary Committees of the Senate and the House, the Chairman of the Senate Judiciary Committee wrote letters to several of the Departments of the Federal Government, asking them to advise the Congress specifically as to the position of these Departments with respect to the proposed quitclaim. One of these letters was addressed to the Department of State and, upon May 26, 1945, that Department replied in a letter signed by Acting Secretary James G. Grew, addressed to the Chairman of the Judiciary Committee of the Senate, stating the position of the State Department as follows:

> "As this matter appears to relate primarily to a domestic question of the respective extent of State and Federal rights, and does not appear to any large extent to fall within the purv*ue* of the activities of this Department, I suggest that other agencies of the Government (for example the Department of Justice and the Treasury Department) are in a better position to furnish helpful suggestions with respect to the joint resolution."[8]

The decision of the Court in the present case is based on the position of the National Government in external affairs. It is of the utmost significance that the agency of the Government directly charged with administering

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[8]Joint Hearings Before the Committee on the Judiciary, House of Representatives and a Special Subcommittee of the Senate Judiciary Committee, 79th Congress, First Session, June 18, 19 and 20, 1945, pages 7, 20.

our external affairs has declared officially to Congress that the issue presented to this Court is one of domestic concern, not involving any question of external affairs. This official communication was addressed to Congress in respect to proposed legislation pending before it, and the position of the State Department reflected therein is obviously at complete variance with the majority opinion herein.

We respectfully submit that there is absolutely nothing in the record before the Court or elsewhere to justify the conclusion that dominion, in a proprietary sense, over the resources of the subsoil of the marginal sea is necessary to the performance by the Federal Government of its constitutional duties in relation to external affairs.

The Court appears to rely upon the proposition that the acts of the State Department in 1793 in recognizing the three-mile limit are binding upon it. On this point the Court says:

> "this assertion of national dominion over the three-mile belt is binding upon this Court." (Op. p. 12.)

We have already shown that the acts of the State Department referred to had no relation whatever to the question of proprietary rights as between States and Federal Government and, hence, could not control the issues in the present case. However, we believe the Court's theory that the acts of the State Department are binding upon this Court in the present case is erroneous in a far more fundamental sense. When the Court states that the assertion

of national dominion is binding upon it, this statement is, with all respect, correct only in the sense that the policy adopted by the National Government *as against other nations* is binding on this Court in any case where that policy is in issue. If the unilateral assertion by Federal officials of a right to appropriate property within the boundary of a State is binding upon this Court, then, indeed, the States are wholly without hope of judicial protection from encroachments of the Federal Government.

The Supreme Court of the United States is the court of the States as well as of the Nation[9] and it is the only tribunal to which the States can look for protection against encroachments upon State property by the Federal Government. If the Court is to consider itself bound by the assertions of Federal officials, then the Court has, in effect, abdicated its function as impartial arbiter between States and Federal Government, and the Executive Department becomes the final arbiter in a dispute such as this.

Furthermore, if the Court deems itself bound by the acts of the State Department, it should, we submit, give effect to the action of that Department in 1945, *when it dealt with the precise question here at issue,* rather than the action taken in 1793, which had nothing whatever to do with the distribution of property rights as between States and Federal Government.

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[9]*Florida v. Georgia* (1854), 17 How. 478.

IV.

Decisions of 100 Years or More Standing Declare and Hold That the Original Thirteen States and Not the National Government Own the Marginal Belt Along Their Coasts.

The majority opinion asserts (p. 10) that:

> ". . . we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it."

Again the majority opinion states (p. 11) that:

> "There is no substantial support in history for the idea that they [the thirteen colonies] wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth."

We respectfully submit that the majority opinion has failed to consider and has disregarded a line of decisions which have stood for over 100 years, that the original thirteen Colonies and States did own, and that the National Government did not own, the adjacent or marginal sea along their respective coasts. These decisions were rendered both by this Court and by the highest State courts in opinions written by some of the outstanding jurists of this country.

Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court said, in 1851, that:

> ". . . all the rights *to the sea* and sea shores, with the incidental rights of fishing, were granted to the colonies . . . all the rights, *both to the soil under the sea, as far as by the law of nations,*

> *one government is conceded to hold an exclusive right to the sea coasts* and other shore and arms of the sea, where the sea ebbs and flows, *did vest in the grantees under those charters.* Whatever right or jurisdiction, if any, remained in the Crown after those grants, it is clear that they ceased on the establishment of independence, *and has remained absolute in the States."* (*Weston v. Sampson* (1851), 62 Mass. (8 Cush.) 346, 351, 353.)

In 1855, Chief Justice Shaw of the Massachusetts Supreme Judicial Court, in *Dunham v. Lamphere,* 69 Mass. (3 Gray) 268, 269, 271-272,[10] said (p. 269):

> *"Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the state,* although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, *that these limits extend a marine league, or three geographical miles, from the shore,* . . ."

Chief Justice Shaw then considered the question whether (pp. 271-272):

> ". . . the right both of *property and dominion over the sea-shore, within the territorial limits* of a sovereign state, and all its incidents—navigation, fishing and all other incidental benefits— . . . *belong properly to the general government, or remain with the state government."*

Chief Justice Shaw answered this question (p. 272), saying:

> ". . . the dominion and controlling power over the sea-coasts, its shores and tide waters, thus abso-

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[10]Expressly followed with approval in *Commonwealth v. Manchester* (1890), 152 Mass. 230; and *Manchester v. Massachusetts* (1891), 139 U. S. 240.

lutely renounced and relinquished by the government of Great Britain, and which must vest somewhere, did, as between the United States and the several states respectively, *fully and absolutely vest in the several states.* This has been definitely settled by the Supreme Court of the United States. (Citing *Pollard v. Hagan.*)"

Again, the Supreme Judicial Court of Massachusetts, in a unanimous decision written by Chief Justice Field and concurred in by Mr. Justice Holmes, made the following unequivocal declaration:

> *"There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."* (*Commonwealth v. Manchester* (1890), 152 Mass. 230.)

This rule, announced in many other decisions,[11] has stood as the law of the land for over 100 years until the majority opinion was filed herein.

Since one of the major premises of the majority opinion is that the original thirteen Colonies or States did not own the adjacent marginal sea along their respective coasts, it is at once apparent that when this deeply embedded rule of law announced by the foregoing decisions is given application to the issues herein, the majority opinion is erroneous and should for that reason be reversed.

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[11] *Commonwealth v. Charlestown* (1822), 18 Mass. (1 Pick.) 179, 182-184; *Barker v. Bates* (1832), 30 Mass. (13 Pick.) 255, 259; *Commonwealth v. Alger* (1851), 61 Mass. (7 Cush.) 53, 65, 66, 78, 88, 92; *Commonwealth v. Roxbury* (1857), 75 Mass. (9 Gray) 451, 478-483, 492; *Arnold v. Mundy* (1821), 6 N. J. L. (1 Halst.) 75, 77, 80; *Gough v. Bell* (1847), 21 N. J. L. (1 Zab.) 156, 159; later appeal in *Gough v. Bell* (1850), 22 N. J. L. (2 Zab.) 441, 455, 472, 473, 489; *Shively v. Bowlby* (1894), 152 U. S. 1, 14, 16.

V.

A Rule of Property Law Has Been Established by the Repeated Dicta and Decisions of This Court for the Last 100 Years, on the Faith of Which Innumerable Titles Have Vested, and the Rule Should Not Now Be Rejected by the Court.

A keystone in the arch of Anglo-American jurisprudence is that once a rule of property has become embedded in the law, whether by repeated dicta or specific holdings, on the faith of which titles to property have vested and business has been transacted, subsequent courts will respect and maintain such rule regardless of what their present view would be if the question were first presented in novel form.

Nowhere in the opinion of the Court is the rule of property law even mentioned. Nevertheless, the Court has overturned 100 years of repeated pronouncements by this Court itself, whether dicta or decision, upon the faith of which titles have vested in countless numbers and business has been transacted in multitudinous forms.

The majority opinion recognizes that the language used by this Court "many times" in past decisions shows that the Court then *believed* that the States and not the National Government owned the soil under all navigable waters, whether inland or in the open sea, where it states (p. 15):

> "And in doing so it [this Court] has used language strong enough to indicate that *the Court then believed that states not only owned tidelands* and soil under navigable inland waters, *but also owned soils*

> *under all navigable waters within their territorial jurisdiction, whether inland or not."*

Of course, that statement is true. *Every Chief Justice of this Court down to the present incumbent of that office (with one exception, and he concurred several times), and at least 18 Associate Justices of this Court, including Justices Holmes and Brandeis, over a period from 1842 to 1945, in more than twenty decisions, have repeatedly stated that the States own the beds of "all navigable waters within their respective borders," or have used language of identical import and meaning.* (State's Br. pp. 120-126.)

It makes no difference that some or many of those statements made by the various members of this Court for a period of 100 years were dicta. The rule of property law operates whether the pronouncements of the highest Court in the land were dicta or decisions.

In *United States v. Guaranty Trust Company* (C. C. A. 8, 1929), 33 F. (2d) 533, 536-537, affirmed 280 U. S. 478, the Circuit Court of Appeals said:

> "The contention of the Government is that the doctrine announced by the decisions just cited, upon which appellees rely, *was dictum merely*, and therefore not entitled to weight as a determination by the Supreme Court . . . . it may be said that while, strictly speaking, the rule announced by the Supreme Court in a number of these cases may be regarded as dictum, nevertheless *the reannouncement of the doctrine repeatedly over a period of more than 100*

years serves to establish it, not only as the consistent view of the Court, but also as a rule of property upon which practical transactions have been, and are being, based."

The reason for this rule is obvious. Citizens have a right to transact their business, purchase realty, make leases, and engage in commerce on the assurance that the pronouncements of this Court, particularly when repeated time after time, become unalterable and will be maintained and enforced by this Court. This is the least that a citizen has a right to expect from the solemn pronouncements of this Court. This is a basic matter of public policy. If it were not so, law as such becomes meaningless.

A just application of this rule of property law to the facts of the instant proceeding compels a reversal of the majority opinion.

VI.

Prescription and Acquiescence: The Majority Opinion, in Its Treatment of the Subjects of Prescription and Acquiescence, Has Deprived the State of Its Sovereignty and Relegated It to the Position of a Private Individual.

The majority opinion pays no heed to the special rules of prescription and acquiescence long held by this Court to govern property rights as between sovereign States and as between a State and the Nation, holding that

> "The Government . . . is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; . . ." (Op. p. 18.)

This treatment involves the fundamental error of assuming that the present action is a suit between the United States as a sovereign on the one side, and a private citizen on the other. On the basis of this erroneous assumption the Court applies the general rule that private rights may not accrue against the sovereign by reason of "principles similar to laches, estoppel, adverse possession." (Op. p. 17.) Even as to a private individual there are exceptions to this rule. (*United States v. Chavez*, 175 U. S. 509, 522.) But the fundamental error here is that *the rule relied upon by the Court has no application at all in a suit between two sovereigns.*

The State of California appears in this Court as a sovereign State. In *Skiriotes v. Florida*, 313 U. S. 69, 77, the Court, through Mr. Chief Justice Hughes, said:

> "Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign."

The same is true of California.

Indeed, the only basis upon which this Court has original jurisdiction in the present case is the fact that it is a suit between sovereigns. In *United States v. Texas,* 143 U. S. 621, 646, when the question of original jurisdiction of this Court over a State was first raised, the Court said:

> "The submission to judicial solution of controversies arising between these two governments, [*i. e.*, the Federal Government and the State of Texas] 'each sovereign, with respect to the objects committed to it' . . . . does no violence to the inherent nature of sovereignty."

The rules as to prescription applying between sovereigns have been recognized by this Court in a multitude of decisions. (State's Br. pp. 138-143.) The principle is summed up in the statement in *Arkansas v. Tennessee,* 310 U. S. 563, 570, where the Court said:

> *"Prescription* . . . may be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. . . .
>
> "This principle of *prescription* and acquiescence, when there is a sufficient basis of fact for its application, so essential to the 'stability of order' as between the States of the Union, ..."

Likewise, the rule as to acquiescence has been applied by this Court many times. The principle of acquiescence

is summed up in the statement in *Indiana v. Kentucky*, 136 U. S. 479, 510, as follows:

> "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

These principles apply not only between States but between a State and the Federal Government, as this Court has held in *United States v. Texas*, 162 U. S. 1, 62, and *New Mexico v. Texas*, 275 U. S. 279, 295, 298, 300.

The effect of the Court's disregard of these settled principles as to the doctrines of prescription and acquiescence between sovereigns is to strip the State of California of the benefits of its constitutional status as a member of the Union of States, again striking at the very foundation of our Federal system.

(A) Title to the Entire Area Is in California on the Doctrine of Prescription.

All elements required *by the decisions of this Court* to establish title in a State by prescription are present in this case (State's Br. pp. 145-151), and may be summarized as follows:

> (i) Public assertion of ownership: California has consistently done this in its Constitution, through its Legislature, and by its courts, for about 90 years.
>
> (ii) Actual occupation, possession and use of substantial portions of the lands in question: The State, its grantees, lessees and licensees, have occupied, possessed and used very large portions—*over 10% of*

the 3,000 square miles—of the submerged lands in the 3-mile belt

(a) By the State granting substantial portions of the 3-mile belt to the coastal cities, commencing in the year 1911;

(b) By the building of wharves, piers, breakwaters, groins, sea-walls and jetties, commencing in the year 1858;

(c) By the drilling into and upon the submerged lands as far out as one mile and the discovery and development of oil and gas in six submerged land oil fields, commencing in the year 1921;

(d) By assessing and collecting taxes upon interests in and to the submerged lands for many decades;

(e) By regulation and control of the fish and fisheries owned by the State upon the basis of the ownership of the submerged lands from the beginning of its Statehood; and

(f) By leasing areas in the Pacific Ocean for kelp harvesting, beginning in the year 1917.

(iii) Actual expenditures of capital and labor in and upon the lands in question: The State, its grantees, lessees and licensees, have expended enormous sums in developing and improving substantial portions of the submerged lands in controversy.

(iv) Nonassertion of any claim of ownership by the United States: For a period of approximately 95 years the United States of America has failed to assert any ownership, and in fact it has officially on numerous occasions ruled that California was the owner.

(v) Constructive possession of whole belt based on actual possession of part: The actual possession of substantial portions of these submerged lands, under claim of ownership of all such lands within the State boundaries, amounts to constructive possession of the entire submerged lands and gives the State title by prescription to all submerged lands within its boundaries. (*Michigan v. Wisconsin* (1926), 270 U. S. 295, 313-318.)

Thus the title of the State of California to all submerged lands in controversy is firmly established on the principle of prescription whereby long-continued and undisturbed possession of land under claim of ownership attains the status of absolute title.

(B) In the Alternative, Title to the Area Actually Occupied, Granted, Leased, or Improved, Is in the State, Its Grantees, Lessees and Licensees, Under the Doctrine of Prescription.

Although we believe that this is a proper case to apply the doctrine of constructive possession under the authority of *Michigan v. Wisconsin, supra,* because of the fact that about 10% of the total area has been occupied, granted, leased or improved, nevertheless, if the Court concludes that the rule of constructive possession is inapplicable, then there is an alternative ground requiring this petition to be granted. Certainly, California is entitled to an application of this rule of prescription, at least as to those areas of the lands in controversy that have been occupied by it or those acting under it and which have been granted, leased, licensed, or improved. We see no possible escape from the justness of this minimum application of the rule of prescription.

VII.

The Alleged Distinction Between Inland Waters and the Marginal Sea Has No Constitutional or Statutory Basis Nor Any Basis in Reason, and Is Created for the First Time by the Majority Opinion Herein.

The majority opinion asserts and finds some real distinction between the ownership of inland waters and the marginal sea, the opinion reading (p. 14):

> ". . . we are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt."

With all respect, this completely misstates the rationale of the *Pollard* case. That case was not based on the theory that local interests predominate in inland waters. Therefore, it is wrong to say that the same rationale leads to the conclusion that national interests predominate in the three-mile belt. This attempt to make a distinction beween inland waters and the three-mile belt on the basis that local interests predominate in the one and national interests in the other is wholly without precedent in law or fact and was invented by plaintiff's counsel in its opening brief in an attempt to distinguish the ruling of the *Pollard* case and other cases which follow it. The true rationale of the *Pollard* case, as this Court has repeatedly

said, is that the State is the owner, as trustee for the public, of all lands beneath the navigable waters within its boundaries. Navigability, which is the foundation of the public interest in such waters, is the criterion and rationale of the *Pollard* case. Local and national interests are false quantities in the argument. Our assertions in this regard are merely a repetition of what this Court has said time after time (See State's Brief, pp. 117-126), that the rationale of State ownership is navigability, and is the same for both inland waters and the three-mile belt.

Furthermore, the Court in referring to the many cases where this Court used language strong enough to indicate that the States owned the soil under all navigable waters within their boundaries, says that all these later statements were not used as announcing a new rule but "in explanation of the old inland water principle." It is quite true that these later cases explained the *Pollard* case, but they did not explain it in terms of the inland water principle because the *Pollard* case was not based on any inland water principle. The later cases explained the *Pollard* case in terms of its true rationale, namely, the existence of navigable waters within the State's boundary. A typical example is *Barney v. Keokuk,* 94 U. S. 324, 338, where the Court, after quoting *Pollard v. Hagan* and *Martin v. Waddell,* said, "These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters." In the light of this and the many other cases which explain the *Pollard* case on the very same basis, we respectfully submit that the Court is in error in its interpretation of the rationale of the *Pollard* case and the cases which followed.

Likewise, the clear statement of State ownership of the marginal sea in the *Abby Dodge* case (223 U. S. 166, 174) is by no means "in explanation of the old inland water principle." The holding of the Court was that " 'The principle has long been settled in this Court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan,* 3 How. 212; . . .' ". There is nothing here about inland waters, but rather the statement of the rule as to all tidewaters within a State's boundary, showing that the rule is the same whether between high and low tide or in the marginal sea. This statement was made in the *Abby Dodge* case in support of the ruling that an Act of Congress regulating the taking of sponges had no application within the territorial limits of Florida. The reason that the Act of Congress had no application was that Florida owned the beds of its marginal sea. If the United States had owned these beds or had even had the proprietary right to appropriate the sponges, the statute would have been valid within Florida's limits (*Camfield v. U. S.,* 167 U. S. 518).

The Court also makes the following statement regarding the *Abby Dodge* case: "But the opinion in that case was concerned with the state's power to regulate and conserve within its territorial waters, not with its exercise of the right to use and deplete resources which might be of national and international importance." We respectfully submit that this incorrectly reflects the decision in the *Abby Dodge* case. The decision held that state owner-

ship of the bed of the sea, including the sponges growing in the soil, rendered a Federal statute relating to those sponges unconstitutional. Sponges are an important natural resource of the soil. And the opinion therefore did protect Florida's right to use and deplete these resources. Whether sponges are of greater importance from a national or international standpoint than oil or some other natural resource is, we submit, entirely irrelevant. We cannot believe that this Court intends to hold that rights of ownership depend upon the relative importance of the property involved. And if this is the Court's holding, then the question arises as to who is to determine which natural resource is of national or international importance and which is not. In the present case no such determination has been made by any agency of the Federal Government and certainly it is not within the province of the Court to determine that question in the first instance. Furthermore, the present controversy is by no means limited to oil, but involves all proprietary rights in the marginal sea, and hence the question of the relative importance of different resources must of necessity be immaterial to the Court's decision. We submit that the Court is in error in its interpretation and application of the *Abby Dodge* case and that there is nothing in this or any other case which supports the alleged distinction between the so-called inland waters and any other navigable waters which are within a State's boundary.

The doctrine of States' ownership of the beds of the Great Lakes has been explained by this Court on sev-

eral occasions as resting upon the same State ownership of the marginal belt along the sea coasts. (State's Br. pp. 110-112.)

And this very distinction as to Federal-State ownership of the beds of inland waters and international boundary waters, it will be recalled, was rejected with a brush of the hand by Mr. Justice Holmes and a unanimous court in 1908 in *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, discussed under Paragraph II hereof, and which case was not considered at all by the majority opinion herein.

Conclusion.

The majority opinion, if it is allowed to stand, will deprive every coastal State of enormous areas of property and of valuable property rights which have long been held and occupied by them under their respective State laws as actual and legal owners. We desire respectfully to call attention to the fact that in support of the majority opinion not one previous decision of this Court is or can be cited, although, as the Court says, there are many of its own decisions which flatly declare the States to be the owners of these properties. There is not one decision of any State court which supports the majority opinion although a multitude of decisions of able State courts uphold State ownership. There is not one constitutional provision cited in support of the majority opinion except those general grants of power which this Court has held

carry with them no proprietary rights. There is not one Federal statute cited in support of the majority opinion, although there are many statutes, particularly those dealing with kelp and sponges, which clearly support State ownership and there are a great many State statutes which declare and assert State ownership. There is not one decision or opinion of any department of the Federal Government prior to 1937 which supports the majority opinion, although there are many decisions of the Interior Department, the Attorney General, the War and Navy Departments, the Department of Agriculture and other departments which specifically uphold State ownership. Not one Federal officer has ever attempted to assume rights of ownership or possession of the three-mile belt, although State officials and State grantees and lessees in every coastal State under State laws have actually occupied large portions of the three-mile belt as owners or lessees. In a word, there is absolutely nothing upon which the Federal claim in this case is or can be predicated except the unsupported declaration of the majority of this Court that national power gives the Federal Government the right to appropriate these properties to its own use, a proposition which as we have shown is contrary to all past decisions on the subject. If this decision should stand, no one today could foretell the extent to which future Federal administrations may go in asserting the right to expropriate private property and property rights on the basis of the vague concept of "national power" which is relied upon therein.

It is respectfully urged that this petition for rehearing and reconsideration of the majority opinion should be granted and that the majority opinion should be reversed on the grounds set forth herein; or, in the alternative, that the petition should be granted and the case set for further argument.

Respectfully submitted,

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The undersigned, Fred N. Howser, Attorney General of the State of California, hereby certifies that the foregoing Petition for Rehearing and Reconsideration of the Majority Opinion is presented in good faith and not for purposes of delay.

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